Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WADE, *et al.*,
Petitioners,
v.
DIANE COUGHLIN, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is the same one that this Court agreed to review, but did not resolve, in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693, 711 (2000):

Whether plaintiffs may rely on the "catalyst theory" to demonstrate that they are "prevailing parties" and thus eligible to recover attorney's fees and costs pursuant to federal fee shifting statutes.

PARTIES TO THE PROCEEDING

The petitioners, Michael Wade, Timothy Wade, and John McClelland, are the three surviving plaintiffs from the case that was pending in the district court. The respondents are the State of Maryland and two state officials who were sued in their official capacities: Diane Coughlin, the Director of the Developmental Disabilities Administration; and, Georges C. Benjamin, the Secretary of the Department of Health and Mental Hygiene.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. The Underlying Lawsuit 4

B. The Petitions for Attorney's Fees and Costs 7

REASONS FOR GRANTING THE WRIT 7

I. This Court Has Already Expressed Interest In Determining Whether the Catalyst Theory Remains Viable 10

II. The Fourth Circuit's Rejection of the Catalyst Theory Conflicts With Eleven Other Circuits 13

III. The Continued Viability of the Catalyst Theory Is An Exceptionally Important Question 15

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Arvinger v. Baltimore, 31 F.3d 196 (4th Cir. 1994) 9

Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541 (3d Cir. 1994) 13, 14, 15

Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) .. 13, 14

Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources, 2000 WL 42250 (4th Cir. 2000) (unpublished), *petition for cert. filed*, 68 U.S.L.W. 3741 (U.S. May 15, 2000) (No. 99-1848) 4, 10

Cady v. Chicago, 43 F.3d 326 (7th Cir. 1994) 13, 14

Craig v. Gregg County, 988 F.2d 18 (5th Cir. 1993) 13

Evans v. Jeff D., 475 U.S. 717 (1986) 9

Farrar v. Hobby, 506 U.S. 103 (1992) 10

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *vacated and remanded*, 120 S. Ct. 693 (2000) 9

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 693 (2000) 10, 11

Gamble v. Maryland State Dept. of Educ., 1996 WL 406258 (4th Cir. July 22, 1996) 9, 12

Hanrahan v. Hampton, 446 U.S. 754 (1980) 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 13

Hewitt v. Helms, 482 U.S. 755 (1987) 7, 11, 12

Kilgour v. Pasadena, 53 F.3d 1007 (9th Cir. 1995) 13, 14

Little Rock School Dist. v. Pulaski County Special School Dist. No. 1 17 F.3d 260 (8th Cir. 1994) 13, 14

Maduka v. Meissner, 114 F.3d 1240 (D.C. Cir. 1997) 13

Maher v. Gagne, 448 U.S. 122 (1980) 12

Marbley v. Bane, 57 F.3d 224 (2d Cir. 1995) .. 13, 14

Marek v. Chesney, 473 U.S. 1 (1985) 9

Morris v. West Palm Beach, 194 F.3d 1203 (11th Cir. 1999) 13, 14, 15

New Hampshire v. Adams, 159 F.3d 680 (1st Cir. 1998) 13

Paris v. U.S. Department of Housing and Urban Development, 988 F.2d 236 (1st Cir. 1993) 13

Payne v. Bd. of Educ., Cleveland City Schools, 88 F.3d 392 (6th Cir. 1996) 13, 14

Pembroke v. Wood County, Texas, 981 F.2d 225 (5th Cir.), *cert. denied*, 508 U.S. 973 (1993) ... 13

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 9

S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education, 6 F.3d 160 (4th Cir. 1993), *reversed*, 21 F.3d 49 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876 (1994) 15

S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) 3, 10

Smith v. Univ. of North Carolina, 632 F.2d 316 (4th Cir. 1980) 3

Statewide Reapportionment Advisory Comm. v. Beasley, 99 F.3d 134 (4th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997) 9

Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782 (1989) 13

Zinn v. Shalala, 35 F.3d 273 (7th Cir. 1994) 13, 14, 15

FEDERAL STATUTES

28 U.S.C. § 1254 1

29 U.S.C. § 794a 2, 3

42 U.S.C. § 1988 ..... 2, 3, 4, 8

42 U.S.C. § 12205 ..... 2, 3

LEGISLATIVE HISTORY

H.R. Rep. No. 94-1558 (1976), *reprinted in* Subcomm. on Constitutional Rights, 94th Cong., 2d Sess. Civil Rights Attorney's Fees Awards Act of 1976 Sourcebook (Comm. Print 1976) 8

S. Rep. No. 94-1011 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908 8

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and reproduced in the Appendix at 1a-9a. The opinion of the district court is unpublished and reproduced in the Appendix at 10a-15a.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant text of 42 U.S.C. § 1988(b), 42 U.S.C. § 12205 and 29 U.S.C. § 794a(b) is set forth in the Appendix at 16a.

STATEMENT OF THE CASE

Petitioners are three individuals with developmental disabilities who were confined by the State of Maryland to the Great Oaks Center, a 24-hour institutional care facility owned and operated by the State that was located in Silver Spring, Maryland.[1] They sued the State and the individual defendants in their official capacities seeking a transfer to community homes for themselves and the other residents at Great Oaks, and to enjoin the State from admitting any new residents to the Center.

Petitioners now seek to recover their reasonable attorney's fees and costs, which total more than $1 million, under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), and other fee shifting statutes, because more than four years after this lawsuit was commenced the State "voluntarily" agreed to transfer petitioners and all but two of the other Great Oaks residents to community-based homes, and close the Center. Although the State had been given the opportunity to remedy the problems at Great Oaks before petitioners filed their lawsuit, it chose to wait until shortly

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[1] There were originally six plaintiffs when this case was filed. Three of the original plaintiffs died while this case was pending in the district court and they were dismissed by the court below.

before trial and after significant attorney's fees and costs had been incurred to finally acquiesce to plaintiffs' requests.

Petitioners rely on the "catalyst theory" to establish that they are "prevailing parties" and thus eligible to recover the amounts that they reasonably incurred in litigating this case.[2] Under this doctrine, plaintiffs may recover their attorney's fees and costs, if their lawsuit serves as a "catalyst which cause[s] the defendant to remedy his errant ways." *Smith v. Univ. North Carolina*, 632 F.2d 316, 347 (4th Cir. 1980).

The district court held that petitioners had "advanced a strong argument" for prevailing party status and "presented a substantial showing" that they "contributed in a significant way to the results" that were obtained by the lawsuit, but said that it was constrained to deny the petitions because the court of appeals had precluded plaintiffs from relying on the catalyst theory by its decision in *S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876 (1994) (hereinafter "*S-1*"), which overruled the above-cited part of *Smith* and other cases. App.

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[2] The plaintiffs brought claims under the Due Process and Equal Protection Clauses of the United States Constitution, the Social Security Act, the Rehabilitation Act of 1973 (Rehabilitation Act), and the Americans with Disabilities Act (ADA). Attorney's fees and costs are available under §1988 for the constitutional claims and for the claim arising under the Social Security Act. The Rehabilitation Act and the ADA separately permit the award of attorney's fees and costs. *See* 29 U.S.C. § 794a(b); 42 U.S.C. § 12205 (reproduced at App. 16a). Each of the attorney's fee statutes at issue in this case provides that "prevailing parties" are eligible for an award of reasonable attorney's fees and costs.

12a-13a n 3. In a sharply divided (7-6) decision, the court of appeals in *S-1* held that absent a formal judgment, consent decree or settlement agreement, plaintiffs may not recover attorney's fees and costs under 42 U.S.C. § 1988. *Id.* at 51.

Petitioners appealed the district court's decision and filed a petition for initial hearing *en banc*, requesting reconsideration of *S-1*. The *en banc* petition was denied and the panel issued a *per curiam* decision, which affirmed that *S-1* barred any recovery of attorney's fees and costs under the catalyst theory.[3]

Petitioners would be eligible to recover their attorney's fees and costs in any other circuit, except the one in which they brought their case. For these and other reasons, petitioners request that this Court correct the rule fashioned by the court below.

A. The Underlying Lawsuit

Petitioners filed the underlying lawsuit on September 6, 1991 through their next friends, seeking a transfer for themselves and all other Great Oaks residents to community-

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[3] Shortly before affirming the district court in this case, another panel of the Fourth Circuit relied on *S-1* to deny another group of plaintiffs the opportunity to demonstrate their eligibility for attorney's fees by way of the catalyst theory. Those plaintiffs have filed a petition that is now pending with this court. *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 2000 WL 42250 (4th Cir. 2000) (unpublished), *petition for cert. filed*, 68 U.S.L.W. 3735, 3741 (U.S. May 15, 2000) (No. 99-1848).

based homes, and to prevent the State from admitting any new residents to the Center.[4] Their complaint was filed nine months after the Department of Justice ("DOJ") completed an investigation in which it found that the conditions at Great Oaks deprived residents of their constitutional rights and that such conditions posed a serious threat to the residents' health and safety. Before filing their lawsuit and after DOJ issued its report, petitioners attempted over many months to negotiate a settlement with defendants, but defendants refused to agree to plaintiffs' requests. During the discovery stage of this case, plaintiffs uncovered an extraordinary pattern of ongoing abuse and neglect of residents by Great Oaks staff, requiring the discipline of more than 450 staff members.[5]

In initially refusing to transfer plaintiffs and other residents to community-based homes, defendants relied on informal policies and practices that violated federal law. For example, they allowed parents to veto recommendations made by a resident's treatment team that community placement was appropriate for that individual.[6] (This came to be called the

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[4] This lawsuit was originally filed as a class action. After the State agreed to treat the case as a class action for all purposes and that a representative sample of residents could be used for discovery purposes, the motion for class certification was withdrawn without prejudice.

[5] Some of the abuse uncovered by plaintiffs led to the filing of criminal charges.

[6] Petitioners acknowledge, as they did in the courts below, that parents or close relatives have a substantial interest in decisions that affect their family member and that they should be allowed to express their views regarding the

"parental veto.") Also, a treatment team would refuse to recommend community placement for a resident who had certain medical needs or who exhibited "challenging" behaviors, even though there was no evidence that such needs and behaviors could not be handled in community facilities.

In the fall of 1995, after attorneys and paralegals had spent thousands of hours taking dozens of depositions, working with expert witnesses, filing motions, and preparing for the trial that had been set by the district court for the following June, defendants abruptly reversed the informal policies and practices that had prevented the discharge of many Great Oaks residents to community facilities. They abolished the parental veto by agreeing to hold individualized administrative hearings for parents or guardians who wished to challenge the State's decision to transfer residents to community facilities, and they substantially scaled back the types of medical conditions and challenging behaviors that prevented residents from community placement. As a result, all but two Great Oaks residents were discharged to community facilities. The State then closed the Center and moved to dismiss the underlying lawsuit. After the Center was closed, the parties entered into a stipulation dismissing the case.

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most appropriate placement. But such objections to community placement arose in this case either from a lack of understanding of the facilities and supports that are available in community facilities, or from a lack of knowledge of the abuse and neglect that was endemic at the Great Oaks Center. In November 1991, 103 parents and guardians filed declarations stating that they were opposed to community placement for their child or ward. After an administrative hearing process was completed, almost all of the parents who had previously opposed community placement withdrew their objections.

B. The Petitions for Attorney's Fees and Costs

Having succeeded in convincing defendants to give them the relief that they sought, plaintiffs then requested that the district court award them their reasonable attorney's fees and costs. Plaintiffs filed two petitions totaling $1,081,588.26 and supported their claim with detailed declarations in support of these amounts as well as other documentation. Defendants reserved their argument on whether plaintiffs had in fact caused the State to transfer almost all of the Great Oaks residents to community facilities and opposed the petitions solely on the ground that plaintiffs were foreclosed by *S-1* from arguing that they had been the catalysts that brought about these changes. The district court and the court of appeals agreed with the defendants.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's "no catalyst" rule conflicts with statements from this Court and the rule followed in eleven other courts of appeals, all of which permit plaintiffs to use the catalyst theory to demonstrate that they are eligible to recover attorney's fees.[7] This Court and all of these other courts of appeals recognize that eligibility for attorney's fees is predicated on outcomes, not formalities. *See, e.g., Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("In all civil litigation, the judicial decree is not the end but the means."). The Fourth Circuit's rule has the perverse effect of discouraging defendants, like the ones here, from making good faith attempts

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[7] The only other court of appeals, the U.S. Court of Appeals for the Federal Circuit, appears not to have faced this issue.

to amicably settle cases. It encourages defendants to drag cases out— continuing to violate the law— until they "voluntarily" correct their violations just before judgment, leaving plaintiffs (many of whom, like the ones here, are not well-financed) to bear the cost of having brought such violations to the attention of the defendant and the court.

The "no catalyst" rule is not grounded in the statutory language of 42 U.S.C. § 1988 or any other fee-shifting statute, and runs counter to the aim of Congress when it enacted such laws. Nothing in the term "prevailing parties" suggests that a formal judgment, consent decree or settlement agreement serves as the exclusive means by which a plaintiff can become eligible to recover attorney's fees or costs. Indeed, relevant legislative history strongly suggests the contrary— that Congress intended for plaintiffs to be able to rely on the catalyst theory to demonstrate such eligibility. *See, e.g.*, S. Rep. No. 94-1011 at 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912 ("For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief") (Attorney's Fees Awards Act of 1976); H.R. Rep. No. 94-1558 at 7 (1976), *reprinted in* Subcomm. on Constitutional Rights, 94th Cong., 2d Sess., Civil Rights Attorney's Fees Awards Act of 1976 Source Book 215 (Comm. Print 1976) ("[A]fter a complaint is filed a defendant might voluntarily cease the unlawful practice. A court might still award fees even though it might conclude as a matter of equity that no formal relief, such as an injunction, is needed."). The "no catalyst" rule also thwarts the legislative policy underlying the attorney's fee statutes, which is to encourage legal counsel to help plaintiffs vindicate violations of their rights. *See, e.g.*, S. Rep. No. 94-1011 at 2 (1976), *reprinted in* 1976 U.S. Cong. Code & Admin. News 5910 ("In many cases

arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."). *See also Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts and thereafter to vindicate their rights. . . .") Plaintiffs' inability to rely on the catalyst theory for recovery of fees and costs discourages lawyers from taking such cases, because defendants can avoid the liability of plaintiffs' litigation fees and costs by unilaterally granting relief at any time before judgment.

The Fourth Circuit's "no catalyst" rule affects a substantial number of cases. There are more than 150 attorney's fee statutes, almost all of which predicate eligibility for attorney's fees on the claimant's ability to demonstrate some degree of success. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983); *Marek v. Chesney*, 473 U.S. 1, 44-51 (1985) (Appendix listing federal fee-shifting statutes). It appears that the Fourth Circuit would extend the "no catalyst" rule to all such statutes; in the six years that it has been in effect the Fourth Circuit has applied the "no catalyst" rule in a wide variety of cases. *See, e.g., Arvinger v. Baltimore*, 31 F.3d 196 (4th Cir. 1994) (Title VII); *Gamble v. Maryland State Dept. of Educ.*, 1996 WL 406258, **2 (4th Cir. July 22, 1996) (Individuals with Disabilities Education Act) (unpublished); *Statewide Reapportionment Advisory Comm. v. Beasley*, 99 F.3d 134, 136 (4th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997) (Voting Rights Act); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303,

306 n. 5 (4th Cir. 1998), *vacated and remanded*, 120 S. Ct.693 (2000) (Clean Water Act); *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 2000 WL 42250 (unpublished) (Fair Housing Amendments Act).

I. This Court Has Already Expressed Interest In Determining Whether the Catalyst Theory Remains Viable

Earlier this term, this Court suggested that the Fourth Circuit's reasoning in requiring a formal judgment, consent decree or settlement agreement before awarding fees is seriously flawed. The question of whether plaintiffs could be precluded from relying on the catalyst theory was presented to this Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. at 711. After briefing and argument, this Court decided that it would be "premature" to decide the issue in the context of that case, because the district court had never ruled on the plaintiffs' petition for fees and costs. But this Court noted that many other circuits do not follow the Fourth Circuit's "no catalyst" rule.[8] *Id.* It also disagreed with the court of appeals' interpretation of *Farrar v. Hobby*, 506 U.S. 103 (1992), the case that the Fourth Circuit relied upon in *S-1* to reject the catalyst theory. *See* 21 F.3d at 51. In *Friends of the Earth*, this

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[8] In the brief that it filed in support of petitioners in *Friends of the Earth*, the United States agreed that "there is good reason to question the court of appeals' dictum that '[petitioners'] failure to obtain relief on the merits of their claim precludes any recovery of attorney's fees or litigation costs . . . .'" Brief of the United States as Amicus Curiae Supporting Petitioners (U.S. No. 98-822) (filed May 17, 1999).

Court said that *Farrar* "involved no catalytic effect" and that the issue of the continuing validity of the catalyst theory had not been "presented for this Court's decision in *Farrar*." 120 S. Ct. at 711.[9]

This Court has endorsed the catalyst theory in other of its decisions. In *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987), this Court said:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee

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[9] Despite this, the Fourth Circuit has been unwilling to overrule *S-1*. This Court decided *Friends of the Earth* after the parties to this petition completed briefing in the court of appeals. In their petition for initial hearing *en banc*, petitioners pointed out that this Court had accepted *certiorari* in *Friends of the Earth* and that the issue presented in the *en banc* petition was the same as one of the issues that this Court would review in *Friends of the Earth*. The Fourth Circuit denied the *en banc* petition without comment. After this Court decided *Friends of the Earth*, petitioners informed the court below of this Court's decision, and the case was also the subject of much discussion at oral argument, but the panel chose not to address the effect of *Friends of the Earth* in its opinion affirming the district court. Likewise, the court of appeals rejected the rehearing and *en banc* petition of appellants in *Buckhannon* (*see supra* n. 3), which also pointed out that *Friends of the Earth* had disapproved the Fourth Circuit's interpretation of *Farrar*. *See* Appellants' Petition for Rehearing and Petition for Rehearing En Banc 8-9, *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources* (4th Cir. No. 99-1424) (filed Feb. 24, 2000).

> award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*. . . . a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

This Court also said in *Hewitt* that "if the defendant, under pressure of the lawsuit, alters his conduct . . . towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed" and that the "action (or cessation of action) by the defendant" toward the plaintiff is the true measure of success in the judicial process. *Id.* at 761.[10] *See also Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("For purposes of the award of counsel fees [under § 1988] parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.") (quoting S. Rep. No. 94-1011 at 5 (1976)); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam) (Person may "be a 'prevailing party' . . . without formally obtaining relief.").

Time and time again, this Court has said that to demonstrate success for purposes of the federal fee-shifting statutes, a plaintiff must point only to a significant issue in litigation "which achieves some of the benefit the parties

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[10] This Court ultimately declined to rule on the validity of the catalyst theory in *Hewitt*, because it held that even if petitioner had caused the defendant to alter the challenged policy, petitioner could not show that he had benefitted from the change in a way that would allow him to recover attorney's fees. *Id.* at 763-64.

sought in bringing the suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1978)). *See also Texas State Teachers Ass'n. v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989) ("A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought . . . ."). The catalyst theory fits well within this "generous formulation." *Hensley, id.*

II. The Fourth Circuit's Rejection of the Catalyst Theory Conflicts With Eleven Other Circuits

No other circuit agrees with the Fourth Circuit's rejection of the catalyst theory. *See Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236 (1st Cir. 1993); *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-550 (3d Cir. 1994); *Craig v. Gregg County*, 988 F.2d 18 (5th Cir. 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231 n. 27 (5th Cir.), *cert. denied*, 508 U.S. 973 (1993); *Payne v. Bd. of Educ., Cleveland City Schools*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Cady v. City of Chicago*, 43 F.3d 326, 328 n. 2 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 17 F.3d 260, 263 n. 2 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (per curiam). Many of these courts have expressly disagreed with the statement in *S-1* that *Farrar* overruled the catalyst theory. *E.g. Marbley*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 549-50;

Payne, 88 F.3d at 397 n. 2; *Zinn*, 35 F.3d at 275; *Little Rock School Dist.*, 17 F.3d at 263 n. 2; *Kilgour*, 53 F.3d at 1010; *Beard*, 31 F.3d at 951-52; *Morris*, 194 F.3d at 1207. The others have continued to permit plaintiffs to rely on the catalyst theory, without addressing the argument that this Court's decision in *Farrar* required its abolition.

The courts of appeals that permit plaintiffs to use the catalyst theory emphasize three factors in their decision to do so. First, they point to the statements made by this Court in the cases cited in Section I of this petition, which teach that so long as changes in the defendant's behavior toward the plaintiff are caused by the plaintiff's lawsuit, no formal declaration by the court or concession by the defendant is required before a plaintiff can be eligible for attorney's fees. *See, e.g., Payne*, 88 F.3d at 397; *Cady*, 43 F.3d at 328. Second, they point out that there is a strong policy interest in permitting plaintiffs to utilize the catalyst theory, because its availability encourages attorneys to take such cases, reinforcing Congress' intent in enacting attorney's fees statutes. *E.g., Baumgartner*, 21 F.3d at 548 ("[F]rom a policy standpoint, if defendants could deprive plaintiff of attorney's fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing their civil rights suits, a result inconsistent with Congress' intent in enacting Section 1988."); *Marbley*, 57 F.3d at 233 ("Congress has deemed litigation to be a worthwhile tool in protecting and vindicating important federal rights. This is the general rationale underlying Section 1988."); *Morris*, 194 F.3d at 1207 ("The catalyst test creates incentives for plaintiffs to initiate potentially meritorious civil rights cases and for plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought.") Third, they observe that the catalyst theory has long been applied in the lower

courts without creating the excessive fact-finding burden that concerned the Fourth Circuit, when it chose to abolish the catalyst theory. *See S-1*, 6 F.3d 160, 171 (panel decision) (Wilkinson, J. dissenting), *incorporated by* 21 F.3d at 51. The court in *Baumgartner* stated:

> the factual question of what work was done and what result it produced is present in any determination of attorney's fees. While it may differ to some extent in a "catalyst" case, that is really a question of degree and one which the district courts, in their fact finding expertise, deal with on a regular basis.

21 F.3d at 548. *See also Zinn*, 35 F.3d at 274 (Explaining that the catalyst theory has been "long recognized."); *Morris*, 194 F.3d at 1206 (same).

III. The Continued Viability of the Catalyst Theory Is An Exceptionally Important Question

The question presented here goes to a core concern of this Court— maintaining uniformity among the federal courts of appeal on an important matter of federal statutory interpretation. No interest is served by having a single court of appeals differently interpret the same federal statutory provision from its sister circuits, especially when that provision (or substantially similar formulations of it) appears widely in a large number of statutes, all of which are designed to achieve the same goal. The "no catalyst" restriction that the Fourth Circuit has placed on plaintiffs who seek to recover attorney's

fees and costs for their successful efforts at remedying violations of their constitutional and federal rights should be overruled by this Court because it is unwarranted, contrary to well-established law and substantially hinders the vindication of important federal rights in a larger number of cases.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their petition for writ of certiorari be granted.

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Dated: July 14, 2000

APPENDIX

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL WADE, a/k/a/ Mark A. Mlawer, by and through his next friend; TIMOTHY WADE, a/k/a Paul Marchand, by and through his next friend; JOHN MCCLELLAND, a/k/a/ Christine E. Boswell, by and through his next friend, Plaintiffs-Appellants, and MARY HUNT, a.k.a. Christie E. Boswell, by and through her next friend; MATROY FOSTER, a/k/a/ Barbara Nelson, by and through her her guardian, All of the above on Behalf of Themselves and All Other Similarly Situated, Plaintiffs, v. DIANE COUGHLIN, Director, Developmental Disabilities Administration; ALLEN RADINSKY, Administrator, Great Oaks Center; GEORGES C. BENJAMIN, Secretary, Department of Health and Mental Hygiene; THE STATE OF MARYLAND; GREAT OAKS ASSOCIATION, INCORPORATED, a Maryland nonstock corporation, Defendants-Appellees	) No. 99-1560

VIRGINIA SOCIETY FOR HUMAN LIFE; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA,

Amici Curiae

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Catherine C. Blake, District Judge
(CA-91-2564-CCB)

Argued: March 1, 2000

Decided: May 24, 2000

Before MICHAEL, Circuit Judge and
G. Ross, Anderson, Jr., United States District Judge
for the District of South Carolina, siting by designation,
and James H. MICHAEL, Jr., Senior United States District
Judge for the Western District of Virginia, sitting
by designation

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Steven Ney, MARYLAND DISABILITY LAW CENTER, Largo Maryland, for Appellants. Kathleen A. Morse, Assistant Attorney General, Baltimore, Maryland, for Appellees. **ON BRIEF:** Susan Goering, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, Baltimore, Maryland; Iran Burnim, BAZELON CENTER FOR MENTAL HEALTH LAW, Washington, D.C.; Arthur B. Spitzer, AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, Washington, D.C., for Appellants. J. Joseph Curran, Jr., Attorney General of Maryland, Maureen A. Dove, Assistant Attorney General, Baltimore, Maryland, for Appellees. Roger E. Warin, Tracy L. Hilmer, STEPTOE & JOHNSON, L.L.P., Washington, D.C. for Amici Curiae.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM

The State of Maryland voluntarily provided the relief sought by § 1983 plaintiffs who are residents of a large State facility for the developmentally disabled. There was no settlement agreement, however, and the lawsuit was dismissed by stipulation pursuant to Fed. R. Civ. P. 41(a)(1). Thereafter, the plaintiffs invoked the "catalyst theory" of "prevailing party" status to seek attorneys' fees under 42 U.S.C. § 1988. The district court denied the fee petitions on the ground that our court had rejected the catalyst theory in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir. 1994) (en banc). Because we agree that *S-1 and S-2* governs, we affirm.

I.

The Great Oaks Center (the Center) in Silver Spring, Maryland, was a residential institution for the developmentally disabled that was operated by the State of Maryland through its Development Disabilities Administration (DDA), a division of the State Department of Health and Mental Hygiene (DHMH). The Center opened in 1970 and its number of residents grew to a peak of about 500 in 1978. Many of the Center's residents, including several of the plaintiffs in this case, were diagnosed with "profound mental retardation." The Center proved to be exceedingly difficult to run, and allegations of problems led the U.S. Department of Justice (DOJ) in 1986 to commence an investigation into conditions there, pursuant to the Civil Rights of Institutionalized Person Act, 42 U.S.C. § 1997 *et seq.*

In January 1991 the DOJ issued written findings and advised then-Governor Schaefer of Maryland that "the State subjects its residents of Great Oaks to conditions that violate their constitutional rights, including conditions that generally threaten the[ir] health and safety." Although the DOJ concluded that the "administration and staff at Great Oaks appear[ed] committed to providing residents with appropriate care in a safe environment," the DOJ discovered five conditions that posed significant dangers to residents. First, according to the DOJ, the Center failed to provide sufficient training for residents to help them avoid undue risks to their personal safety. This lack of training led the Center's staff to make unreasonable use of physical and chemical restraints. Second, there was a general failure to provide residents a adequate protection from physical injuries. Third, the Center's staff was not appropriately trained. As a result, residents were not property supervised, which "contribute[d] to [the] alarmingly high frequency of resident injuries." Fourth, physical therapy

services for residents were woefully inadequate. This deficiency, the DOJ believed, had caused a number of residents to lose the "ability feed themselves, walk, or propel their wheelchairs." Fifth, recordkeeping at the Center was deficient. For example, the Center did not keep behavioral records for residents, and data about each resident's progress (or lack of it) were not collected in a consistent manner. Because of poor recordkeeping, the staff was unable "to render [informed] professional judgments regarding care, treatment, and training of residents." The State contends that it took appropriate remedial measures in response to the DOJ report.

Nevertheless, in September 1991, about eight months after the DOJ issued its findings, six residents of the Center (by their next friends) brought this § 1983 class action against the State of Maryland and various officials (collectively, the "State"), alleging deficiencies in the care provided at the Center. By the agreement of counsel, a representative sample of sixteen residents (ten percent of the population) was selected for purposes of pretrial discovery. The Center produced the complete institutional file for each of these residents, and discovery began.

It appears that the Center continued to run into difficulty after the DOJ report was issued and this lawsuit was filed. For example, in the summer of 1994, the Center lost its status as a Medicaid provider because it did not meet certification requirements. By the end of 1994 the plaintiffs' lawyers believed that a more comprehensive complaint was warranted, and an amended complaint was filed on December 22, 1994. The theme of the amended complaint was that "Great Oaks Center is a dangerous place to live." The plaintiffs alleged (1) that they had been "subjected to injury, abuse, neglect, and unnecessary physical restrains" and (2) that they

had been denied "necessary medical care, as well as habilitative services needed to prevent their deterioration," in violation of the Due Process and Equal Protection Clauses, the Social Security Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Among other things, the plaintiffs took aim at the Center's policy of allowing parents (or close relatives) to override professional staff recommendations to transfer residents into community-based facilities. Injunctive relief was requested. The plaintiffs asked that the State be (1) enjoined from admitting any new residents the Center and (2) ordered to transfer current residents to community living arrangements in accordance with the recommendations of their treating professionals.

The State filed its answer to the amended complaint on January 11, 1995. In addition to denying the charging allegations of the amended complaint, the State defended the Center's policies and alleged that each resident was receiving individualized care appropriately tailored to his or her circumstances. Among other things, the State alleged that (1) successful community placement efforts had reduced the Center's population to 160 residents, (2) the staff-to-resident ratio had improved, (3) training programs for both staff and residents had been instituted, (4) professional staff assessed each resident's needs on an ongoing basis, (5) restraints were used infrequently and only in behavioral emergencies, (6) a new incident tracking system had helped to reduce the number of resident injuries, and (7) the physical appearance of the Center had been improved.

On February 21, 1995, the district court consolidated this case with three other (similar) cases and set a date for trial. In the meantime, the State decided to close the Center. Dr. Georges Benjamin, Deputy to the Secretary of DHMH, and

Diane Ebberts, Acting Director of the DDA, told the Center's staff at a meeting in August 1995 that the Center was being closed because of the pending lawsuit, high employee turnover, high costs, and building repair needs. DHMH Secretary Martin Wasserman mentioned the lawsuit when he reported on plans to close the Center to committees of the Maryland General Assembly in June 1995:

> the closure of Great Oaks Center is based on costs which are escalating beyond any other Developmental Disabilities Administration (DDA) facility, and upon employee recruitment and retention problems which have made it problematic for Great Oaks Center to maintain its license and certification for federal Medicaid funding, to meet U.S. Department of Justice requirements, and to prepare for a successful trial in the case of *Hunt v. Meszaros* [the caption of this case in district court].

After the State decided to close the Center, the district court, by order entered October 20, 1995, postponed the trial. Shortly thereafter, beginning in November 1995, DHMH Secretary Wasserman wrote individual letters to the residents of the Center and their parents (or guardians). In each letter the Secretary reported his findings that the resident "no longer meets [state law] requirements for admission to a State Residential Center because there is a less restrictive kind of service that is available which is consistent with [his or her] welfare and safety." The resident was accordingly designated for transfer to "community placement." The Secretary further acknowledged that "as a result of discussions with parties to a lawsuit," the State had adopted a new procedure for resolving any parental objection to the placement of a resident in a

community-based facility. Parents would no longer have the option to veto a professional recommendation of community placement. Instead, any parental objection would be referred (upon request of the parent) to an administrative law judge for hearing and decision.

In January 1996, the State moved to dismiss the amended complaint on the ground that the State was "doing precisely" what the plaintiffs had requested in their prayer for relief: in the State's words, "the deinstitutionalization of individual residents in community centers." In due course, all but two of the Center's residents were moved to community-based housing, and the Center was closed.* On September 8, 1998, the parties stipulated to a dismissal of the lawsuit, agreeing that there was "no further need for litigation." The stipulation, however, stated that "the dismissal will have no bearing on the parties' positions for the purposes of attorneys' fees and should [not] be construed ... as a settlement for the purpose of attorneys' fees."

The several lawyers for the plaintiffs pressed petitions for attorneys' fees and expenses, notwithstanding the dismissal. Altogether, the lawyers sought fees and expenses in the amount of $1,081,588.26. They were entitled to fees, they said, because their clients were prevailing parties for purposes of 42 U.S.C. § 1988, The Civil Rights Attorney's Fees Awards Act of 1976. The lawyers argued to the district court that their clients had prevailed because their lawsuit caused the State to change its conduct and provide the relief requested (the Center's residents were placed in community-based homes and the Center was closed), even though there was no enforceable judgment or settlement documents. Fees were thus sought under what is known as the "catalyst theory."

The district court acknowledged that the plaintiffs had "advanced a strong argument for prevailing party status" under the catalyst theory, "in light of the closing of the Center and the placement of its residents in the community." The court added that the plaintiffs had "presented a substantial showing" that their efforts had contributed in a significant way to this result. However, the court stopped short of actually finding that the plaintiffs' lawsuit had served as a catalyst for the change in the State's position. Rather, the district court denied the petitions for fees on the ground that the catalyst theory for attorneys' fee recovery is not available to a § 1983 plaintiff in this circuit. *See S-1 and S-2*, 32 F.3d at 51 (rejecting the catalyst theory and holding that an enforceable judgment, consent decree, or settlement is necessary for prevailing party status under § 1988). The plaintiffs appeal.

II.

After carefully considering the brief, the joint appendix, and the arguments of counsel, we affirm on the reasoning of the district court. *See Hunt v. Meszaros*, Civ. No. CCB-91-2564 (D. Md. Mar. 25, 1999).

AFFIRMED

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* The State contends that the Center was closed because of (1) the State's commitment to community placement, (2) high costs and problems with employee recruitment and turnover, (3) capital improvement needs, and (4) prospects for a very profitable sale of the Center's real estate due to its prime location near Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY HUNT, ET AL.,	:	
Plaintiffs	:	
	:	
v.	:	Civil No. CCB-91-2564
	:	
LOIS MESZAROS, ET AL.,	:	
Defendants	:	
	:	
GREAT OAKS	:	
ASSOCIATION	:	
Intervenor	:	

MEMORANDUM

On September 6, 1991, the plaintiffs filed suit in this court challenging conditions at the Great Oak Center ("the Center"), a facility then operated by the Developmental Disabilities Administration ("DDA") within the State of Maryland's Department of Health and Mental Hygiene ("DHMH"). The plaintiffs filed an amended complaint on December 22, 1994, claiming that the care and treatment of Center residents did not meet constitutional standards. As described by the State defendants, the relief sought was "the deinstitutionalization of the residents of the Center and placement of individual residents in community facilities." (Defendants' Memorandum in Support of Their Motion to Dismiss filed January 23, 1996, at 1) As also acknowledged by the State, with regard to the relief sought by the plaintiffs, "[d]efendants are doing precisely that. . . ." (Id.) Well before

April 1, 1998, when this case was dismissed by agreement, [1] the Center had been closed and virtually all residents had been placed in the community.

The plaintiffs, noting that the State initially opposed their request to close the Center, and that as late as 1995 the State had a practice of deferring to family opposition even when the professional staff recommended community

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[1] An Agreement to dismiss was stated orally on the record on April 17, 1998. A Stipulation of Dismissal was submitted on March 22, 1999 and is being entered by the court today. In relevant part, that Stipulation provides:

> The parties agree that there is no further need for litigation of this action. Great Oaks Center is closed and all but two of the residents were moved to community-based residential programs. To the extent that plaintiffs challenge the adequacy of placements, they choose to do so in Maryland Disability Law Center v. Wasserman, Case No. 90099040/CE 11746, Circuit Court for Baltimore City. The parties further stipulate that the dismissal will have no bearing on the parties' positions for the purposes of attorneys' fees and shall be construed neither as a settlement for the purpose of attorneys' fees or as a waiver on the part of the State defendants in asserting any defenses in presently pending litigation, in other pending litigation or in contemplated litigation.

placement for a particular resident,[2] assert that they are entitled to attorneys' fees as a prevailing party under 42 U.S.C. § 1988. They rely on a version of the "catalyst" theory previously recognized by the Fourth Circuit. See DeMier v. Gondles, 676 F.2d 92, 93 (4th Cir. 1982); Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979). Under that theory, even in the absence of an enforceable judgment, consent decree, or settlement, a plaintiff may be able to establish its status as a prevailing party. As explained in Bonnes, the court's inquiry to determine prevailing party status should first establish:

> . . . the precise factual/legal condition that the fee claimant has sought to change so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

599 F.2d at 1319. Under that theory, the plaintiffs in this case have advanced a strong argument for prevailing party status, in light of the closing of the Center and placement of its residents in the community.[3]

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[2] See Petition for Interim Award of Attorneys' Fees and Expenses, Ex. 33.

[3] The plaintiffs must also show that their efforts "contributed in a significant way" to the results obtained. Bonnes, 559 F.2d at 1319. They have presented a substantial

The decision on Bonnes, however, has been explicitly overruled by the Fourth Circuit in S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (adopting at its own Judge Wilkinson's dissenting panel opinion in S-1 at 6 F.3d 160, 1658-72 (4th Cir. 1933)). Following Farrar v. Hobby, 506 U.S. 102 (1992), the Fourth Circuit concluded that "[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party." S-1, 21 F.2d at 51. See also Arvinger v. Mayor of Baltimore, 31 F.3d 196, 202-03 (4th Cir. 1994); Clark v. Sims, 28 F.3d 420, 425 (4th Cir. 1994).[4]

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showing of such contribution in their Petition for Interim Award of Attorneys' Fees and Expenses, including statements by Maryland officials indicating that this lawsuit was a factor in the decision to close the Center. (Petition, Ex. 40 and 41). In light of what I believe is controlling Fourth Circuit law on the catalyst theory, however, I am not resolving this issue but instead have permitted the defendants to reserve their right at a later date to rebut the factual allegations in the Petition and to dispute the reasonableness of the fees and expenses claimed, should that become necessary. (See Defendants' Memorandum in Support of Opposition to Plaintiffs' petition, at 1).

[4] District courts in this Circuit nevertheless have found the catalyst theory available for consideration as a factor in determining the appropriate amount of fees to be awarded, if the plaintiff's prevailing party status has been otherwise established. Clark v. Sims, 894 F. Supp. 868, 872 (D. Md. 1995); see also Lucas v. Guyton, 901 F. Supp. 1047, 1055-56 (D.S.C. 1995). That construction of S-1 does not assist these plaintiffs in being recognized as prevailing parties.

Every other Circuit that has considered the catalyst theory after Farrar appears to have recognized its continued validity.[5] Strong public policy arguments may be articulated in support of this result; perhaps even stronger arguments may be made that the opinion in Farrar should not be read to overturn a previously well-established basis for recovery of attorneys' fees. See Statewide v. Beasley, 99 F.3d 134, 137 (4th Cir. 1996) (Motz, J. concurring). In the absence of any Supreme Court decision to the contrary, however, this court is of course obligated to follow Fourth Circuit law.[6] Accordingly, without

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[5] See New Hampshire v. Adams, 159 F.3d 680, 685 (1st Cir. 1998); Marbley v. Bane, 57 F.3d 224, 234 (2d Cir. 1995); Kilgour v. City of Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1995); Cady v. City of Chicago, 43 F.3d 326, 328 n.2 (7th Cir. 1994); Beard v. Teska, 31 F.3d 942, 951-52 (10th Cir. 1994); Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 550 (3d Cir. 1994); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 17 F.3d 260, 263 n.2 (8th Cir. 1994); Craig v. Gregg County, Tex., 988 F.2d 18, 20-21 (5th Cir. 1993); Citizens Against Tax Waste v. Westerville city Sch. Dist. Bd. of Educ., 985 F.2d 255, 257-78 (6th Cir. 1993).

[6] The plaintiffs also argued at the hearing on April 17, 1998 that the State's decision to afford a hearing before an administrative law judge if an individual or a family member objected to a specific community placement, and Secretary Wasserman's announced willingness to abide by the results of the hearing process (see Petition, Exh. 32), constituted a material alteration in the legal relationship between the parties that entitled the plaintiffs to prevailing party status. According to the letter from Secretary Wasserman, the decision to offer a hearing "was reached as a result of discussions with parties to a lawsuit. . . ." (Id.) It was a voluntary decision, however, not

reaching the factual issues and the reasonableness of the amounts claimed, a separate order denying the plaintiffs' interim and supplemental petitions for award of attorneys' fees will be entered.

March 25, 1999
Date

s/ Catherine C. Blake
Catherine C. Blake
United States District Judge

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embodied in or enforceable through a judgment, consent decree, or settlement of this lawsuit. Accordingly, while it might be relevant for consideration under a catalyst theory, I do not believe it is sufficient under S-1 to establish prevailing party status. See Correa v. Vance, 950 F. Supp. 118, 122 (D. Md. 1996).

STATUTES INVOLVED IN THE CASE

42 U.S.C. § 1988(b):

In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs . . . .

42 U.S.C. § 12205:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . .

29 U.S.C. § 794a(b):

In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

(2)

No. 00-75

IN THE
Supreme Court of the United States

MICHAEL WADE, *et al.*,
Petitioners,

v.

DIANE COUGHLIN, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 28, 2000

QUESTION PRESENTED

After a final order of dismissal that disposes of all claims in a case, may plaintiffs who have not obtained a judgment, a consent decree or a settlement agreement, or otherwise materially altered the legal relationship between the parties, be deemed prevailing parties for purposes of obtaining attorneys' fees under federal fee-shifting statutes?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. The Rule of Law Applied By The Fourth Circuit To Determine Applicability Of The Fee Shifting Statutes Fully Complies With The Decisions Of This Court. 4

II. The Purported Conflict Between The Fourth Circuit And Other Circuits Is Overstated. 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Association for Retarded Citizens of Connecticut v. Thorne, 68 F.3d 547 (2nd Cir. 1995) 8,9
Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 10
Board of Education of Downers Grove Grade School v. Steven L., 89 F.3d 464 (7th Cir. 1996) 9
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 11
Craig v. Gregg County, 988 F.2d 18 (5th Cir. 1993) . 10
Farrar v. Hobby, 506 U.S. 103 (1992) 3,5,6,8,9,10
Foreman v. Dallas County, Texas, 193 F.3d 314 (5th Cir. 1999) 9,10
Hewitt v. Helms, 482 U.S. 755 (1987) 6
Kilgour v. City of Pasadena, 53 F.3d 1007 (9th Cir. 1995) 10
Maher v. Gagne, 448 U.S. 122 (1980) 10
Marbley v. Bane, 57 F.3d 224 (2nd Cir. 1995) 8
Morris v. City of West Palm Beach, 194 F.3d 1203 (11th Cir. 1999) 9

New Hampshire v. Adams, 159 F.3d 680, (1st Cir. 1998) 8
Olmstead v. L.C. ex rel. Zimring, 119 S. Ct. 2176 (1999) 7
Paris v. U.S. Department of Housing and Urban Development, 988 F.2d 236 (1st Cir. 1993) 8
Pembroke v. Wood County, 981 F.2d 225 (5th Cir. 1993) 10
Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782 (1989) 5
S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education of North Carolina, 21 F.3d 49 (4th Cir. 1994) *(en banc)*, *cert. denied*, 513 U.S. 876 (1994) 3,5
S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education of North Carolina, 6 F.3d 160 (4th Cir. 1993), *rev'd en banc*, 21 F.3d 49 (4th Cir. 1994) 3,5,6
Zinn v. Shalala, 35 F.3d 273 (7th Cir. 1994) 9

MARYLAND STATUTES AND REGULATIONS

MD. CODE ANN., HEALTH GENERAL ART. (1995 Repl. Vol) §7-502 1

STATEMENT OF THE CASE

Petitioners are former residents of the Great Oaks State Residential Center for the Mentally Retarded in Silver Spring, Maryland. An individual is admitted to a state residential center in Maryland if the individual has mental retardation and needs residential services for habilitation, and there is no less restrictive setting with the needed services available for the individual. *See* MD. CODE ANN. HEALTH GENERAL ART. §7-502 (Repl. Vol. 1995). Each of the plaintiffs has mental retardation and other serious disabilities. (J. A. 32-42.)[1]

In September 1991, plaintiffs, through their next friends and counsel, filed suit against various officials of the Maryland Department of Health and Mental Hygiene and its component division, the Developmental Disabilities Administration. (J. A. 7, Docket No. 1.)[2] Plaintiffs claimed that conditions at Great Oaks violated their rights under the Constitution and the Rehabilitation and Americans with Disabilities Acts, and asked as relief that they be transferred to State-funded community placements and that defendants be enjoined from admitting new residents into Great Oaks. (J. A. 55-58.)

Defendants had already been placing persons out of Maryland institutions into State-funded community placements for years, and continued to do so after suit was filed. Great Oaks continued to "down-size" throughout the litigation and, in December 1994, William Donald Schaefer, who was the Governor of Maryland at that time, announced

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[1] References to "J. A." are to the Joint Appendix filed with the Court of Appeals in this case.

[2] Since the law suit was originally filed, the identity of these state officers has changed several times, and, pursuant to Fed. R. Civ. P. 25(d), the officers' successors have been substituted as parties.

the State's intention to close the center. In July 1995, his successor, Governor Parris Glendening, confirmed that decision and reiterated that Great Oaks would close at the end of that fiscal year, *i.e.*, by June 1996. (J. A. 1-28; J. A. 235.)

As the fee petitions in this case demonstrate, the great bulk of discovery took place after this second, confirmatory announcement. (J. A. 619-628.) In January 1996, defendants filed a motion to dismiss or to stay, on the basis that the Center would be closed and the case would be rendered moot before trial took place. (J. A.163.) Plaintiffs opposed both the dismissal and the stay. Dismissal was opposed on the basis that mere closure of the Center and placement of the residents into the community was not sufficient to guarantee the residents' rights. Rather, plaintiffs now further insisted that "the need to remedy the lingering effects of the State's prior illegal conduct requires more than a change in residential placement, [and] there is a reasonable expectation that the State will return to its wrongful practice of confining to an institution persons with disabilities who can live in integrated settings." Plaintiffs' February 9, 1996 Memorandum in Opposition to Defendants' Motion to Dismiss or in the Alternative to Stay, at 26. Plaintiffs opposed the stay on the grounds that the closure would not resolve the case. *Id.* at 34.

In March 1996, the Court denied defendants' motion to dismiss, but granted their motion to stay the proceedings. (J. A. 26, Docket No. 172.) At the same time, plaintiffs moved for an interim award of attorneys' fees, claiming fees of more than $600,000 for private counsel, Swidler & Berlin, since its entry into the case a year earlier. (J. A. 225.) The State filed a status report on July 1, 1996, reporting that the Center had in fact been closed (J. A. 27, Docket No. 180), and an opposition to the fee petition in September 1996 (J. A. 634 *et seq.)* After the case had lain dormant for two years, plaintiffs in March 1998 filed a supplemental petition for fees of more than $400,000 for the

non-profit entities that had taken part in their representation. (J. A. 27, docket No. 186; J. A. 638.) The total amount of fees claimed was $1,081,588.26.

The parties' stipulation of dismissal was approved by the district court in March 1999 (J. A. 189) and, on the same day, the court issued a memorandum and order denying plaintiffs' attorneys' fee request. (App. 13a.) Relying on *S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994)(*en banc*) (adopting Judge Wilkinson's dissenting panel opinion in *S-1* at 6 F.3d 160, 168-172 (4th Cir. 1993), the court stated that, "[f]ollowing *Farrar v. Hobby*, 506 U.S. 103 (1992), the Fourth Circuit concluded that '[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party.'" (App. 13a.)

Although the court suggested that plaintiffs had made a substantial showing that they had been a catalyst, it specifically did not resolve that issue, preserving defendants' right at a later date to rebut the factual allegations in plaintiffs' petition, should that become necessary. (App. 12a-13a, n3.) Indeed, defendants had limited their opposition to the fee petition to the legal issue; did not present evidence or argument regarding the cause of Great Oaks' closure; and reserved the right to respond to the factual allegations regarding causation and to dispute the reasonableness of the amount of fees requested. (J. A. 634-635.)

The district court also refused to accept plaintiffs' theory, raised for the first time at argument in April 1998, that hearings provided by the Secretary of Health and Mental Hygiene to remaining Great Oaks' residents and their parents in early 1996 constituted an alteration in the legal relationship of the parties sufficient to make plaintiffs prevailing parties. (App. 14a n.6.)

After having lingered on the court's docket for almost eight years, the case was finally dismissed three years after the Great Oaks Center was closed. There had not been a single finding of fact by the district court and there had been no final judgment, no consent decree, and no settlement agreement. As Petitioners recognized, the State was not legally barred from returning to a policy of institutionalization. Plaintiffs' February 9, 1996 Opposition at 26.

Petitioners appealed the district court's decision, and filed a petition for a hearing *en banc* that was denied. The Court of Appeals affirmed on the reasoning of the district court. (App. 9a.)

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court because the rule of law applied by the Fourth Circuit here wholly complies with the decisions of this Court, and the purported conflict between the Fourth Circuit and other circuits on the application of the "catalyst" theory to requests for attorneys' fees is more a question of semantics than of substance. In stating that prevailing party status is contingent on the existence of an enforceable judgment, consent decree, or settlement agreement, the Court of Appeals in this case has merely identified the bright-line criteria it uses for determining whether a material change in the legal relationship has occurred that would give rise to a fee award. There was no such change in this case.

While Petitioners at one point in this litigation decried the "reasonable expectation that the State may return to its former policy" and thus insisted on injunctive relief "to assure that the State does not revert, for budgetary or other reasons, to its prior illegal practices," Plaintiffs' February 9, 1996 Opposition at 9, they abandoned that request for relief when they dismissed this case. Thus, although Maryland has no intention to do so, it is free to

return to the precise behavior that triggered this litigation. There has been no change in the legal relationship of the parties, and, therefore, this is not the appropriate case for determining whether the "catalyst" theory remains viable. Under the well-settled precedents of this Court and the lower appellate courts, Petitioners are not entitled to attorneys' fees.

I. The Rule of Law Applied By The Fourth Circuit To Determine Applicability Of The Fee Shifting Statutes Fully Complies With The Decisions Of This Court.

The standard the Court of Appeals used in this case in determining Petitioners' fee eligibility does not warrant review because it closely follows this Court's rulings: Petitioners have failed to identify any significant change in their legal relationship with Maryland giving rise to the right to a fee award. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989). As this Court recognized in *Farrar v. Hobby*, 506 U. S. 103 (1992), "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 113. Citing this language, the Court of Appeals in its *en banc* decision in *S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (adopting Judge Wilkinson's dissenting opinion in 6 F.3d 160, 168 (4th Cir. 1993), *cert. denied*, 513 U.S. 876 (1994)), identified three ways in which it is possible to change the legal relationship of parties in litigation: by judgment, consent decree, or settlement agreement enforceable by a court. As this case illustrates, because Petitioners achieved none of these, the Court of Appeals' approach is neither legally remarkable nor improper.

"It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award . . . ." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). A voluntary change in conduct by the defendant may suffice, *id.* at 760-61, but such a change does not necessarily include anything more than the three routes set forth in *Farrar* that the Court of Appeals has adopted as its attorneys' fee benchmark. Rather, the third "settlement" route in *Farrar* may be assumed to include both monetary settlements and agreements to change conduct. A plaintiff who secures a settlement agreement, either for money or a change in conduct, will have prevailed without a formal judgment. However, the settlement must be contained in a legally enforceable agreement in order to change the legal relationship between the parties and create prevailing party status. *S-1*, 6 F.3d at 171.

Petitioners current argument is completely contrary to the position they previously espoused in opposing the State's motion seeking the dismissal of this case. That position demonstrated their failure to achieve a change in legal relationship. When the State argued that closing Great Oaks rendered this case moot, Petitioners actively opposed the motion to dismiss, arguing that "cessation of illegal activity in the face of a lawsuit does not render a case moot, particularly when the illegal activity is as widespread and longstanding as its has been in this case." February 9, 1996 Opposition at 4.

Petitioners accordingly argued in the District Court that the State had not met its burden of showing that the challenged conduct would not recur, and contended that, "[a]bsent the force of a court injunction, there can be no assurance that the State will not revert to its prior, longstanding practice of confining certain class members to large institutions, even though they could live in more integrated settings." February 9, 1996 Opposition at 25. *See also id.* at 30 (claiming that there is a "reasonable expectation that the State will revert back to those policies

once it believes it is no longer at risk of an adverse judgment"); *id.* ("Despite its repeated insistence, the State cannot insure that residents will not be returned to Great Oaks, or, for that matter, will be moved to another institution elsewhere in the State for lack of community supports.").

Petitioners subsequently abandoned their efforts, however, to secure such injunctive relief. Thus, as their own papers filed in this case have recognized, the change of behavior at issue here created no material alteration in the legal rights of Petitioners or other disabled persons, or in their legal relationship with the State of Maryland. Without being required to do so by a judgment, consent decree, or enforceable settlement, the State closed the Great Oaks Center and placed its residents, including Petitioners, in the community. Although it has no intention to do so, and, indeed, takes great pride in its strong commitment to community placements, the State of Maryland is free to re-open a Great Oaks or other similar residential center, de-fund community placements, and re-institutionalize Petitioners and those similarly situated, within only the constraints set forth in *Olmstead v. L.C. ex rel. Zimring*, 119 S.Ct 2176 (1999), and pre-existing State law standards.

Application of the Court of Appeals' criteria for determining prevailing party status in this case is entirely consistent with this Court's decisions. The underlying holding of the Court of Appeals rests on the legally unremarkable principle that a party has not prevailed and is not entitled to attorneys' fees absent a judgment, a consent decree, an enforceable settlement, or any other material alteration of his or her legal relationship with the defendant. Further review of this case is therefore not warranted.

II. The Purported Conflict Between The Fourth Circuit And Other Circuits Is Overstated.

Although Petitioners make much of the Fourth

Circuit's supposed disagreement with other circuits, a close reading of the pertinent cases reveals that the Court of Appeals' analysis and application of prevailing party law is not substantially different from that of most other circuits, often a difference of semantics rather than substance. Even in some of those circuits that purport to apply the catalyst theory, the "touchstone of the prevailing party inquiry" set out in those cases – a material alteration of the legal relationship between the parties – has nevertheless been implicitly or explicitly incorporated into their prevailing party inquiry. In *Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236 (1st Cir. 1993), for example, Congress passed federal legislation providing plaintiffs with the relief they sought, thus providing a material change in the parties' legal relationship. *Id.* at 237-38. Similarly, in *New Hampshire v. Adams*, 159 F.3d 680, 683 (1st Cir. 1998), the court recited the need for relief that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* (quoting *Farrar*, 506 U.S. at 111-12).

Although the Second Circuit explicitly retained the catalyst test in *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1995), the same court several months later, in *Association for Retarded Citizens of Connecticut v. Thorne*, 68 F.3d 547 (2nd Cir. 1995), ignored *Marbley* and observed that "[r]ecent Supreme Court cases have stated that the key to determining whether a party prevails is whether the litigation resulted in an alteration of the legal relationship between the parties. [citations omitted] The 'plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement.'" 68 F.3d at 552 (quoting *Farrar*, 506 U.S. at 111) (ellipsis in original). The court concluded that no such change in legal relationship had occurred, but held that, in any case, the lower court no longer had subject matter jurisdiction. *Assn. for Retarded Citizens*, 68 F.3d at 552.

Likewise, although the Seventh Circuit in *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994), explicitly retained the catalyst theory, the defendant in that case had adopted a new Medical Assistance regulation providing plaintiffs the relief they sought, *id.* at 274, thus providing a material alteration in the legal relationship between the parties. The Seventh Circuit more clearly applied the material alteration test in *Board of Education of Downers Grove Grade School v. Steven L.*, 89 F.3d 464 (7th Cir. 1996), in holding that the plaintiff could not be considered to have substantially prevailed because the outcome of the suit had resulted in no enforceable obligation on the part of the school district, and no relief was in the form of a judgment or enforceable settlement. *Id.* at 468.

Similarly, while the Eleventh Circuit in *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1205-07 (11th Cir. 1999), explicitly held that the catalyst test survived *Farrar*, the court nevertheless defined the first prong of the catalyst test as requiring that the plaintiffs show that their legal action created a "material alteration of the legal relationship of the parties." *Id.* at 1207.

The Fifth Circuit stated in *Foreman v. Dallas County, Texas*, 193 F.3d 314 (5th Cir. 1999), that it has never fully explored the impact of *Farrar* on the viability of the catalyst theory and that it has never addressed the issue directly. *Id.* at 320. The court stated that *Farrar* places the continuing validity of the catalyst theory in serious doubt, as its language "strongly suggests that the plaintiff must obtain some merits-based relief which alters its legal standing with the defendant before it may claim prevailing party status." *Id.* at 320. However, the court declined to "engage in that close debate," holding that, if the catalyst theory still applies, the facts did not support a finding that the plaintiff had either obtained the relief he sought by the legislative change that ended the case, or proved that he was

the cause of that change. *Id.* at 320-321.[3]

In several of the cases cited by Petitioners, there existed a judgment, consent decree, or settlement agreement that supported the attorneys' fee request. *See Kilgour v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir. 1995) ("Kilgour obtained an enforceable stipulated judgment requiring the City to make substantial modifications to the Rose Bowl press box."); *Beard v. Teska*, 31 F.3d 942, 944 (10th Cir. 1994) ("In June 1990 the plaintiff class, Departments and Sand Springs entered into a Settlement Agreement under which the Education Department assumed the responsibility. . . ."). As this Court has explicitly recognized, such relief establishes prevailing party status. *See Farrar*, 506 U.S. at 111; *Maher v. Gagne*, 448 U.S. 122, 128 (1980). The prevailing party standard that the Court of Appeals applied in this case does not conflict with cases such as these, in which the courts merely applied the catalyst theory to determine whether the plaintiff's efforts were causally related to the relief obtained.

Thus, the rule of law applied by the Fourth Circuit to

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[3] The court also noted that the possible conflict between *Farrar* and the catalyst theory was not addressed in either of the Fifth Circuit cases cited by petitioners here (Petition at 13) as standing for the proposition that the Fifth Circuit has definitively retained the catalyst theory after *Farrar*. *See* 193 F.3d at 320-21. Indeed, in *Pembroke v. Wood County*, 981 F.2d 225 (5th Cir. 1993), the court attempted to distinguish *Farrar* as limited to suits seeking money damages, but did not discuss its potential conflict with the catalyst theory. In *Craig v. Gregg County*, 988 F.2d 18 (5th Cir. 1993), the court acknowledged the issue, and questioned whether the catalyst theory was still good law, but reached no resolution because the plaintiff had not shown causation in any event. Thus, the Fifth Circuit has never spoken definitively on the issue.

determine prevailing party status is not substantively different from that applied by a number of the circuit courts with which Petitioners claim a conflict exists. In none of those courts is a party entitled to fees in a case such as this, where there was no material alteration of legal rights.

As this Court emphasized in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1978), "when a district court awards counsel fees to a plaintiff, it is awarding them against a violator of federal law." No such finding has ever been made in this case. The closure of Great Oaks and placement of its residents in the community, were voluntary and unaccompanied by an enforceable judgment, consent decree, settlement, or anything else representing a material change in the State's legal relationship with Petitioners. This case thus presents no question that warrants the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WADE, *et al.*,
Petitioners,
v.
DIANE COUGHLIN, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The State And The Court Below Continue To Rely On A Discredited Interpretation Of An Opinion By This Court 3

II. The Rule In Eleven Other Circuits Irreconcilably Conflicts With The Rule In The Fourth Circuit 4

III. The State's Fact-Based Arguments Are Incorrect And Irrelevant To The Question Presented 6

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Farrar v. Hobby,
506 U.S. 103 ..... 2, 3

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,
120 S. Ct. 693 (2000) 2, 3, 4

Kasza v. Browner,
133 F.3d 1159 (9th Cir.), *cert. denied*,
525 U.S. 967 (1998) 6

Krocka v. Chicago,
203 F.3d 507 (7th Cir. 2000) 5

Morris v. Lindau,
196 F.3d 102 (2d Cir. 1999) 5

Morris v. West Palm Beach,
194 F.3d 1203 (11th Cir. 1999) 5

Olmstead v. L.C. ex rel. Zimring,
119 S. Ct. 2176 (1999) 7

Paris v. U.S. Department of Housing and Urban Development,
988 F.2d 236 (1st Cir. 1993) 5

S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education,
21 F.3d 49 (4th Cir.), *cert. denied*,
513 U.S. 876 (1994) 3

Texas State Teachers Ass'n. v. Garland Indep. School Dist.,
489 U.S. 782 (1989) 4

Zinn v. Shalala,
35 F.3d 273 (7th Cir. 1994) 5, 6

FEDERAL STATUTES

42 U.S.C. § 1988 1

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners ask this Court to determine whether the Fourth Circuit errs in refusing to permit plaintiffs to rely on the catalyst theory to demonstrate that they are prevailing parties under 42 U.S.C. § 1988 and other federal fee shifting statutes. Even though this Court last term suggested that the Fourth Circuit's reasoning in abolishing the catalyst theory was seriously flawed, the court below has been unwilling to overrule itself, or even reconsider the issue. That unwillingness

is particularly problematic, given that eleven other circuits permit plaintiffs to rely on the catalyst theory. This Court should grant the petition to correct the error of the court below.

Even before this Court issued *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), which repudiated the Fourth Circuit's interpretation of *Farrar v. Hobby*, 506 U.S. 193 (1994), the district court in this case foresaw that this Court might need to review the question presented:

> Every other Circuit that has considered the catalyst theory after *Farrar* appears to have recognized its continued validity. Strong public policy arguments may be articulated in support of this result; perhaps even stronger arguments may be made that the opinion in *Farrar* should not be read to overturn a previously well-established basis for recovery of attorney's fees. In the absence of any Supreme Court decision to the contrary, however, this court is of course obligated to follow Fourth Circuit law.

Pet. App. 14a (footnotes and citation omitted).

The State makes two arguments in opposition to the petition. First, the State asserts that the Fourth Circuit's decision to abolish the catalyst theory was correct and consistent with decisions of this Court. Second, it claims that some of the other courts of appeals do not disagree with the Fourth Circuit (even though many of them explicitly say that they do). Throughout its opposition, the State also intimates that the facts of this case make it an improper one to review whether the catalyst theory remains viable.

The State's first argument has already been discredited by this Court in *Friends of the Earth,* 120 S. Ct. at 711. The State's second argument is based on an erroneous legal assumption as well as a misreading of the law in some circuits. The State's intimations that this is not the proper case to review the continued vitality of the catalyst theory are not only wrong but also irrelevant to the question presented, because the district court reserved decision on all relevant factual issues in the event that the catalyst theory becomes available. Petitioners file this Reply to fully explain the fallacies in the State's opposition to the *certiorari* petition.

I. The State And The Court Below Continue To Rely On A Discredited Interpretation Of An Opinion By This Court

The State continues to assert that the Fourth Circuit was correct in *S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ.,* 21 F.3d 49 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876 (1994), when it abolished the catalyst theory and held that formal judgment, consent decree or settlement agreement are the only means by which a plaintiff can demonstrate prevailing party status. Other developments besides these can moot the need for continued litigation and, if caused by the lawsuit, serve as the basis for a determination that plaintiffs are prevailing parties. Like the court below in *S-1*, the State relies primarily on *Farrar*, 506 U.S. 103, to support its assertion, but this Court said in *Friends of the Earth*, 120 S. Ct. at 711, that *Farrar* did not extinguish the catalyst theory. For factual reasons that do not exist in this case, this Court in *Friends of the Earth* found it "premature" to rule on the continued vitality

of the catalyst theory.[1] By granting the petition, this Court can put the issue to rest.

The State reads the statement of this Court in *Texas State Teachers Ass'n. v. Garland Indep. School Dist.*, 489 U.S. 782, 793 (1989), that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute," to mean that only a formal judgment, consent decree or settlement can materially alter the parties' legal relationship and thus confer prevailing party status. But nothing in that statement, or anything else in that opinion, indicates that this Court sought to restrict prevailing plaintiffs from relying on other post-filing developments to demonstrate eligibility for attorney's fees. Like the Fourth Circuit's construction of *Farrar*, the State's construction of *Texas State Teachers Ass'n.* is novel but unwarranted.

II. The Rule In Eleven Other Circuits Irreconcilably Conflicts With The Rule In The Fourth Circuit

The State fails to mount a serious argument that eleven other circuits do not restrict plaintiffs to formal judgments, consent decrees and settlement agreements in proving prevailing party status. Indeed, the State does not even try to take issue with the fact that *S-1* conflicts with the rule in the

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[1] In *Friends of the Earth*, the district court stayed the time for filing attorney's fees petitions until after the appeal on the merits had been resolved. When the Fourth Circuit held that plaintiffs could not recover attorney's fees, no order permitting or denying attorney's fees was before it. *See* 120 S. Ct. at 711-12.

Third, Sixth, Eighth and D.C. Circuits. But the State does try to reconcile *S-1* with the decisions of some other circuits.

Relying on its misreading of *Texas State Teachers Ass'n*, the State tries to suggest that opinions from some circuits are only "semantically" in conflict with *S-1*. *See* Brief in Opposition at 8. The conflict between the Fourth Circuit and eleven other circuits is not a semantic one. The State cannot escape the fact that in the other circuits plaintiffs may point to more than a formal judgment, consent decree or settlement agreement to establish prevailing party status. *See, e.g., Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236 (1st Cir. 1993) (supervening legislation); *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994) (supervening regulation); *Morris v. West Palm Beach*, 194 F.3d 1203, 1208 (11th Cir. 1999) (amendments to ordinance and policy). And the district court has already said that plaintiffs here might well be prevailing parties, if the catalyst theory is available to them. *See* Pet. App. 12a. In any other circuit but the one that has jurisdiction over this lawsuit, plaintiffs would at least be entitled to a factual determination of whether they are prevailing parties.

The State also suggests that the Second and Seventh Circuits may be moving toward the Fourth Circuit's "no catalyst" rule. This is flatly incorrect. In *Morris v. Lindau*, 196 F.3d 102, 116 (2d Cir. 1999), the court recently reiterated that "[u]nder the 'catalyst doctrine,' a plaintiff who obtains a settlement *or a voluntary cessation of the challenged activity* is a 'prevailing party' entitled to attorney's fees under 42 U.S.C. § 1988, if the lawsuit was a catalyst or a substantial factor for the defendant's favorable action." (emphasis added). Likewise, in *Krocka v. Chicago*, 203 F.3d 507, 517 (7th Cir. 2000), the court reiterated that "where the defendant voluntarily

granted the plaintiffs' desired relief and the pending case was dismissed as moot, the plaintiffs may [be] entitled to attorney's fees . . . ." (quoting *Zinn*, 35 F.3d at 276). And although the plaintiffs in the Ninth and Tenth Circuit decisions cited in the Petition could point to a formal judgment or settlement agreement, that observation does not take away from the fact that these circuits continue to permit plaintiffs to establish that they are prevailing parties via the catalyst theory. *See, e.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1175 (9th Cir.) (Agreeing with district court determination that plaintiff was prevailing party because government mooted lawsuit by performing activities that plaintiff demanded in her complaint), *cert. denied*, 525 U.S. 967 (1998).

III. The State's Fact-Based Arguments Are Incorrect And Irrelevant To The Question Presented

The State incorrectly argues that petitioners cannot demonstrate that they are prevailing parties under the "material alteration" gloss that this Court gave to that term in *Texas State Teachers Ass'n*. The State is required to make findings pursuant to State law before any individual may be admitted to a residential facility like Great Oaks, released or transferred to a community-based care facility. The State issued "final decisions" that the Great Oaks residents were no longer suitable for residential treatment and that they were being transferred to community facilities. *See* J.A. 129 (Defendants' Memorandum in Support of Motion to Dismiss or Stay at 8).[2] Notices of the State's *en masse* reversal were issued in November 1995 and January 1996, more than four years after this litigation

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[2] "J.A." refers to the Joint Appendix that was filed in the court of appeals.

commenced and very shortly after the district court had set this case for trial in October 1995. *See* J.A. 502-03.[3] The district court noted in its opinion that while this could not satisfy the test established in *S-1*, it "might be relevant for consideration under a catalyst theory." Pet. App. 14a-15a n. 6. The district court should be permitted to consider this and other arguments in deciding whether plaintiffs are prevailing parties.

The State is also incorrect in contending that petitioners will not be able to demonstrate that they are prevailing parties if they are permitted to rely on the catalyst theory, and that some of the attorney's fees and costs generated by plaintiffs were unnecessary. The district court cited various admissions by State officials that this lawsuit *was* a factor in the decision to close the Center. *See* Pet. App. 13a n. 3. And it is hardly surprising that the parties continued to engage in discovery after Governor Glendening announced his intention to close Great Oaks in July 1995, because in October 1995 the district court set a trial date for the following June. In any event, the district court explicitly said that it was not resolving any factual issues related to plaintiffs' prevailing party status, and it specifically allowed the State to reserve its right to rebut plaintiffs' claims, if the Fourth Circuit or this Court holds that the catalyst theory is available. App. 12a-13a n. 3.

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[3] As the State acknowledges in its Brief in Opposition at page 7, it would have to render new "final decisions," and it would also have to satisfy the standards set forth by this Court in *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2181 (1999), before it could reinstitutionalize the former residents of Great Oaks. The State is thus *not* free to return to the policies that led to this lawsuit.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their petition for writ of certiorari be granted.

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